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SUPREME COURT OF APPEALS OF VIRGINIA.

WYTHEVILLE.

THOMAS V. JONES.

July 15, 1897.

1. TAXATION—*Delinquent lands—Acts 1895-6, p. 219.* Service of application to purchase unredeemed lands may be made on non-resident by personal service, under sec. 3232 of the Code, as well as by publication, under Acts 1895-6, p. 219.
2. TAX DEEDS—*Delinquent lands—Section 661 of Code.* Even if such service were irregular, it would not have invalidated the clerk's deed, under the provisions of section 661 of the Code.
3. TAXES—*Priority of tax-lien over prior vendor's lien—Section 661 of Code.* The Commonwealth's lien for taxes on real estate is entitled to priority over a vendor's lien, though the latter incumbrance was created before the accrual of the tax out of which the lien arises, and a purchaser at a tax sale takes title free of the vendor's lien.

Appeal from decree of the Corporation Court of the city of Bristol, in a suit in chancery to enforce a vendor's lien, in which suit the appellee was the complainant and the appellant was the defendant.

Reversed.

Rhea & Peters and *H. W. Sutherland*, for the appellant.

Keebler & Martin, for the appellee.

HARRISON, J., delivered the opinion of the court.

This suit was brought by H. E. Jones, appellee here, to subject to the payment of a vendor's lien a lot in the city of Bristol conveyed by him in 1890 to F. F. Clark. The lot was sold in 1893 for taxes assessed against it in the hands of Clark, and bought in by the State. After this sale Clark died, and one A. C. Keebler qualified as his administrator. The lot was not redeemed in two years, and John D. Thomas, appellant here, filed his application, and became the purchaser thereof, under Acts 1895-96, p. 219, the clerk executing and delivering to him the deed, which was duly recorded.

After setting forth these facts, the bill alleges that the deed to appellant is not valid, first, because the sergeant of the city of Bristol did not execute the application of appellant to become the purchaser upon the administrator of Clark within said city, but executed it in the State of Tennessee; and, second, because the vendor's lien is prior

to the tax lien, and that the appellant took the land subject to all liens thereon, and that appellee has the right to subject the same in the hands of appellant to the satisfaction of his vendor's lien.

The answer filed by appellant admits the facts to be as stated in the bill, but denies that the law will afford appellee the relief sought.

The application which was served by the sergeant upon the administrator of Clark in the city of Bristol, but on the Tennessee side of the line, is not in the record. The only defect in its execution pointed out and relied on in the pleadings, or referred to in argument, is that it was served in the State of Tennessee, and not valid for that reason. We must presume, therefore, that in all other respects the service was regular.

Acts 1895-96, p. 219, under which appellant made the purchase, provides that if, for any reason, the officer cannot serve the application, that then the clerk shall insert a copy thereof in a newspaper for four successive weeks, and that such published notice shall have the same effect as personal service, if the delinquent does not redeem in the time prescribed. This is equivalent to an order of publication.

Section 3232 of the Code provides that personal service of a summons, *scire facias*, or notice may be made by any person not a party to, or otherwise interested in, the subject-matter in controversy, on a non-resident defendant out of this State, which service shall have the same effect, and no other, as an order of publication duly executed. In such case, the return must be made under oath, and must show the time and place of such service, and that the defendant so served is a non-resident of this State; so that, although executed in the State of Tennessee, the application may have been properly served if the sergeant was acting as a private individual, and made his return conform to the requirements of section 3232. Such a service would have been equivalent to an order of publication, and sufficient, in this case, under Acts 1895-96, p. 219.

Whether or not it would be proper, under the circumstances of this case, to assume that the service was made in the prescribed mode, we do not decide. It is not necessary here to determine whether the service was defective or not, for, if it had been insufficient, it would not have invalidated the deed.

The legislature has, presumably with the purpose of making more stable titles acquired under tax sales, provided in section 661 of the Code, which section, by the terms of Acts 1895-96, is made part thereof, that a title acquired as the one in question has been is "sub-

ject to be defeated only by proof that the taxes or levies for which said real estate was sold were not properly chargeable thereon, or that the taxes and levies properly chargeable on such real estate have been paid." It follows, from what has been said, that no valid objection has been shown to the deed, or to the proceedings which led to its execution.

The second inquiry involves the order of priority between the tax lien and the vendor's lien.

This court has held, in *Simmons v. Lyle's Adm'r*, 32 Gratt. 752, that taxes are a prior lien to judgments obtained and duly docketed long prior to the date at which the taxes were assessed. There is no distinction, in principle, between the two cases. For the same reason that the tax is held to be prior in dignity to the judgment lien, it must be preferred to the vendor's lien. That taxes are prior in dignity to all other liens must be so from the very necessity of the case; otherwise the State would be powerless to collect her revenue. The liens upon the land would, as in the case at bar, often be greater than the value of the land, and, the tax lien being inferior, the land would escape all taxation. The provision in section 661 of the Code that "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made," refers to the character of the title that shall be vested in the grantee in such deed, whether it be a fee simple or otherwise. It has no reference to liens, and does not mean, as contended, that the purchaser takes the land subject to the liens resting thereon at the time the taxes are assessed.

The State, having bought the lot in question under a sale made to enforce its prior lien for taxes, took the title vested in Clark, and all subsequent liens became thereby extinguished. Appellant, having in the prescribed mode become the purchaser from the State, stands in the shoes of the Commonwealth, and holds the lot free from the vendor's lien now asserted against it. The holder of the vendor's lien had the right to protect his lien by paying the taxes, and abundant opportunity was afforded him by the statute to redeem. Having failed to avail himself of these privileges, he cannot now mend his fortune by disturbing the vested rights of others.

For these reasons, the decree appealed from must be reversed and annulled, and the bill filed by appellee dismissed. *Reversed.*

NOTE.—Heretofore it has been regarded that the purchaser at a tax sale acquired only such title or estate or interest in the land as the party who was assessed with the tax himself had at the beginning of the year in which the tax, for which

it was sold, was assessed. The foregoing decision declares that the purchaser's title overrides the liens or other incumbrances which the owner may have previously put on it. Reference is made in the court's opinion to *Simmons v. Lyle*, 32 Gratt. 752, as authority for the proposition that a tax which has become delinquent is a lien on the property, and must be paid out of the proceeds of sale, on a sale of the same, ahead of prior liens, by deed of trust or otherwise. That case does so decide. But that is hardly authority sufficient for saying that a purchaser at a tax sale gets a title superior to prior liens, when the statute says his right or title shall be the same as was vested in the party assessed with the tax at the commencement of the year for which the tax was assessed. The same volume that contains *Simmons v. Lyle* has *Gates v. Lawson* (32 Gratt. 12), which decided that where land was sold and a deed made, but not recorded, and a tax afterwards assessed in the vendor's name, and it was returned delinquent and bought at a tax sale, the purchaser at such sale did not acquire any title because the vendor had none for the year in which the tax was levied; the court, on page 15, saying:

"Now it is clear that under this section, Terry being 'the party assessed with the taxes (on account whereof the sale was made) at the commencement of the year (to-wit: the year 1865) for which the taxes were assessed,' Gates and Clark took, under their purchase at the treasurer's sale, *only such title* as Terry had on the 1st day of January, 1865. On that day Terry had no title. He had parted with his title nearly twelve months before; for on the 16th day of February, 1864, he had, for a valuable consideration, conveyed the land to Robertson and Buchanan."

Thus we see this case deciding plainly that the purchaser at a tax sale gets *only such title* as the owner has in the land. To the same effect is *Smith v. Lewis*, 2 W. Va. 39 (1867), which puts the tax title below a prior deed of trust on the property. On page 51 the court say:

"Now, by the 23d section, ch. 37, of the Code (of Va.) 1860, it is provided that when the purchaser of any real estate so sold gets his deed in conformity to the statute, 'such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or account whereof the sale was made.' Edward W. Lewis, in whose name the lots were charged, had only an equity of redemption therein, after paying the trust debt secured on the lot to Mary Lewis. And as Smith, as purchaser at the tax sale, can claim no more than the estate conferred by his tax deed, he is limited to the equity of redemption, that being all the estate vested in Lewis, in whose name it was charged with taxes and delinquent."

The principal case seems to be in conflict with these two constructions of the tax title statutes in Virginia, and yet the court makes no reference to them.

There is a slight change in the verbiage of the statute. In the Codes of 1860 and 1873 it was, "such estate shall stand vested," &c.; in the Code of 1887 it is, "the right or title to such estate shall stand vested," &c. But no reference is made to this change by the court, and it would seem to be immaterial, or if any significance is to be attached to the wording, that the language of the later statute would be more in consonance with the former construction.

There is a later decision in West Virginia to the effect that the purchaser at the tax sale gets a title superior to prior liens by deed of trust or otherwise, but that is made under the statutes afterwards adopted in that State, one of which reads:

"And if, at the time of such sale, the lands sold be under a mortgage or deed of trust, or there be any other lien or encumbrance thereon, and the mortgagee, trustee, *cestui que trust*, or person holding any such lien or encumbrance, shall fail to redeem the same within the time prescribed by sec. 15 of said chap. 117, then all the right, title and interest of such mortgagee, trustee, *cestui que trust*, and of the person holding any such lien or encumbrance on the land so sold, and not redeemed, shall pass to and be vested in such purchaser, and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance." *Summers v. Kanawha* (1885), 26 W. Va. 159.

The Virginia statute contains nothing whatever showing that prior liens were to be affected. The ground on which the court rests its decision seems to be in the language, "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made, at the commencement of the year for which said taxes or levies were assessed." The court saying that this refers to the character of the estate, whether a fee simple or otherwise, that the party has in the land, and not to his right or interest in it. The effect of this decision must be realized as important, for nothing is more common than for money to be loaned on real estate for a period of years, and nothing is more certain than that there are now instances without number of loans on real estate which are over-due and allowed to stand with the hope of an improvement in the market. The doctrine enunciated will tend to destroy real estate as a security or basis of credit, and he who deals with it as such must henceforth, year by year, watch at his peril and see that the party to whom he has made a loan pays his taxes, otherwise the first thing he may know somebody will buy it at a tax sale, and the creditor's mortgage, deed of trust, judgment, or other security, without any notice whatever to him, will be extinguished.

JACKSON GUY.

[In 2 Va. Law Reg. 563, will be found an opinion of Judge Whittle, of the Circuit Court of Lynchburg, construing section 661 of the Virginia Code in the same way that the Court of Appeals has construed it in the principal case. We believe that the general opinion of the profession of the State is, contrary to what Mr. Guy supposes, that the lien for taxes is superior to that of all other liens, whensoever accrued, and that a tax deed conveys title free from incumbrances. As said by Judge Whittle, "All persons dealing with a citizen do so with knowledge of the fact that his property is to bear annually its ratable proportion of the common burden necessary for the support of the government. They will be held to make their contracts with this knowledge, and that their private rights or convenience must be subordinated to the more important public right of maintaining the government, the maxim being, that "*Jus publicum privatorum pactis mutari non potest.*" The establishment of a contrary rule would lead to infinite embarrassment, if, indeed, it did not destroy the autonomy of the State."

The decision in *Gates v. Lawson*, 32 Gratt. 12, does not seem to us to be necessarily inconsistent with the ruling in the principal case. In the former case, the tax had been assessed against one who had parted with his title, by absolute conveyance, twelve months before the assessment was made. He therefore had no shadow of title—whether in fee or otherwise. Hence, under the statute, the purchaser—taking only such title as "was vested in the party assessed"—took

nothing. In the principal case, the party against whom the tax was assessed had a fee-simple title, but subject to the incumbrance of the vendor's lien. Hence, as held, the purchaser took the fee-simple title ; but as the sale was made to satisfy a lien confessedly superior to the vendor's lien, the purchaser took the title with the vendor's lien extinguished. Otherwise, where there are incumbrances prior in date to the tax lien, equal to or exceeding in amount the value of the land, the Commonwealth, with its admitted prior lien, would not be able to find a purchaser for the land, and must be relegated to the tedious remedy of a chancery suit, like an ordinary creditor, to have the property sold free of liens. The courts are apt to lean against the adoption of any principle which would thus hamper the Commonwealth in the prompt collection of its revenues.

The doctrine of the principal case is now fixed by statute. Section 456 of the Code, as amended by Acts 1895-6, p. 255, declares that "All real estate . . . shall be subject to such annual taxation as may be prescribed by law, and there shall be a lien on such real estate for the payment of the taxes and levies imposed thereon, *hereafter assessed, prior to any other lien or incumbrance thereon,*" etc.—
EDITOR VA. LAW REG.]